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EXAMINER

MADSEN, ROBERT A

ART UNIT

PAPER NUMBER

1761

DATE MAILED: 03/13/2003

Please find below and/or attached an Office communication concerning this application or proceeding.

**Office Action Summary**

Application No.

09/753,926

Applicant(s)

SIMPSON ET AL.

Examiner

Robert Madsen

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-- The MAILING DATE of this communication appears on the cover sheet with the corresponding address --

**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☐ Responsive to communication(s) filed on \_\_\_\_.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1-46 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-46 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☐ The proposed drawing correction filed on \_\_\_\_ is: a) ☐ approved b) ☐ disapproved by the Examiner.
- If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

**Priority under 35 U.S.C. §§ 119 and 120**

- 13) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- \* See the attached detailed Office action for a list of the certified copies not received.
- 14) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).
- a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

**Attachment(s)**

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449) Paper No(s) \_\_\_\_.
- 4) ☐ Interview Summary (PTO-413) Paper No(s) \_\_\_\_.
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: \_\_\_\_\_

## **DETAILED ACTION**

### ***Election/Restrictions***

1. During a telephone conversation with Jerry Mueller on January 29, 2003 a previously made restriction requirement was confirmed. In view of the art, the restriction requirement is withdrawn.

### ***Claim Objections***

2. Claim 44 is objected to under 37 CFR 1.75(c), as being of improper dependent form for failing to further limit the subject matter of a previous claim. Applicant is required to cancel the claim(s), or amend the claim(s) to place the claim(s) in proper dependent form, or rewrite the claim(s) in independent form. Claim 44 recites the same limitation as its parent claim, claim 43.

### ***Claim Rejections - 35 USC § 112***

3. The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

4. Claim 46 recites the limitation "said polymeric film" in step d. There is insufficient antecedent basis for this limitation in the claim. There is no polymeric film recited in the parent claims (i.e. claim 40 and claim 38). For examination purposes, the "said polymeric film" will be taken to mean "said sleeve".

***Claim Rejections - 35 USC § 103***

5. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

6. Claims 1, 2, and 5 are rejected under 35 U.S.C. 103(a) as being unpatentable over Anderson (US 5011066) in view of Fritz (US 5423453).

7. Regarding claims 1, 2, and 5, Anderson teaches a microwavable tray that is placed in an upstanding position, as recited in claim 1 (Column 1, line 25 to Column 2, line 40), with a flat sidewall area as recited in claim 2 (See flange 50), and has a sleeve that covers the tray cavity holding a food pouch as recited in claims 5 (Column 8, lines 34-Column 9, line 13, item 82 in Figure 2) Anderson is silent in teaching a base with a raised button as recited in claim 1.

8. However, Fritz teaches it is notoriously well known in the art to include a raised button on the base of a microwavable tray to distribute the contents in the tray and distribute the heat throughout the tray during cooking (Column 1, lines 50-60, Column 2, lines 10-15, Column 2, lines 30-35, Column 3, lines 10-30). Therefore, it would have been obvious to modify the tray of Anderson and include a raised button on the base since a raised button will better distribute the contents in the tray and distribute the heat during cooking than a flat base and one would have been substituting one known base design for another for the same purpose: microwave trays.

9. Claims 3, 4, 6, 8, and 9 are rejected under 35 U.S.C. 103(a) as being unpatentable over Anderson (US 5011066) in view of Fritz (US 5423453), as applied to 1, 2, and 5 above, further in view of Gics (US 5900263).

10. Regarding claim 3, Anderson teaches a front panel of the sleeve covers the cavity of the tray (Column 8, lines 34-Column 9, line 13), which includes nutritional information and graphics (Column 3, lines 56-61), a side panel covers a sidewall of the tray, and a rear panel covers a portion of the tray base (See Figures 1 and 2). However Anderson is silent in teaching the sleeve *surrounds* the tray. Gics is relied on as evidence of the conventionality of a food tray that can be upstandingly placed comprising a sleeve that surrounds the tray. Gics teaches this is an improvement of sleeves wherein the nutritional information and cooking instructions are provided on the front panel, as taught by Anderson, since nutritional information and cooking instructions can be supplied on the rear panel so that front panel may be made more appealing to consumers by displaying decorative graphics only (Column 1, lines 10-59). Therefore, it would have been obvious to modify the sleeve of Anderson so that the sleeve surrounds the tray since this type of sleeve designs provides a more appealing front panel for a consumer. One would have been substituting one known sleeve design for another for the same purpose: to surround a food tray that is upstandingly placed.

11. Regarding claim 4, Anderson teaches the sleeve has a front panel with a display (item 19, Figure 8), a rear panel adjacent the base (i.e. item 61) that extends outwardly (away from the base) to form a leg for standing (See Figures 2, 5).

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12. Regarding claim 6, Anderson teaches the sleeve covers the food cavity (Column 8, lines 34-Column 9, line 13).

13. Regarding claims 8 and 9, Anderson teaches the cover is releasably adhered to the food cavity (Column 8, lines 34-Column 9, line 13), but is silent in teaching the cover is a polymeric film. Gics is relied on as evidence of the conventionality of using a polymeric film to seal the cavity, as recited in claim 8, in combination with the sleeve, as recited in 9, as an alternative to sealing the food cavity with the sleeve alone and providing the added feature of being able to view the food the tray ( Column 3, lines 3-10 and Column 3, lines 64 to Column 4, line 2, ). Therefore, it would have been obvious to provide a polymeric film to seal the cavity since Gics teaches sealing with either the sleeve or a film and the film provides viewing of the contents of the tray. One would have been substituting one conventional seal for the same purpose: sealing a tray that is upstandingly placed.

14. Claim 7 is rejected under 35 U.S.C. 103(a) as being unpatentable over Anderson (US 5011066) in view of Fritz (US 5423453) and Gics (US 5900263), as applied to claims 3, 4, 6, 8, and 9 above, further in view of Davis (US 5540381).

15. Anderson teaches a flange perpendicular to the tray sidewall, but is silent in teaching slots in the sleeve for retaining the flange. Davis is relied on as evidence of the conventionality of sleeves surrounding food containers comprising slots in the sleeve to receive the flange of the containers to secure the container in the sleeve (Abstract, Column 1, lines 9-26, Column 1, line 57 to Column 2, line 40, see the flange

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42 Figure 1 in light of Figure 2). Therefore it would have been obvious to include slots in the sleeve for retaining the flange since this would secure the tray in the sleeve and one would have been substituting one conventional sleeve design for another for the same purpose: surrounding a food container.

16. Claims 10,12,15,18,20,23,24,28,30-33,35 are rejected under 35 U.S.C. 103(a) as being unpatentable over Anderson (US 5011066) in view of Fritz (US 5423453) and Gics (US 5900263).

17. Regarding claims 10,18, 28, 32,35 Anderson teaches a microwavable tray that is placed in an upstanding position (Column 1, line 25 to Column 2, line 40) and a sleeve that covers the tray cavity holding a food pouch, as recited in claim 35,(Column 4, lines 1-16, Column 8, lines 34-Column 9, line 13 item 82 in Figure 2) wherein the sleeve has a front panel with nutritional information and graphics adjacent to tray opening , as recited in claim 32 ,(item 19 in Figure 8, Column 3, lines 56-61), a rear panel adjacent the base(i.e. item 40 in Figure 11) that extends outwardly (away from the base) to form a leg for standing (See Figures 2 and 5) as recited in claims 10,18, 28. Although Anderson teaches the tray is upstanding, Anderson is silent in teaching a base with a raised button as recited in claim 10,18, and 28. Additionally, although Anderson teaches the sleeve includes a front panel, side panel, and rear panel ,Anderson is silent in teaching the sleeve *surrounds* the tray as recited in claims 10, 18,28, and 32.

18. Fritz teaches it is notoriously well known in the art to include a raised button on the base of a microwavable tray to distribute the contents in the tray and distribute the

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heat throughout the tray during cooking (Column 1, lines 50-60, Column 2, lines 10-15, Column 2, lines 30-35, Column 3, lines 10-30). Therefore, it would have been obvious to modify the tray of Anderson and include a raised button on the base since a raised button will better distribute the contents in the tray and distribute the heat during cooking than a flat base.

19. With respect to having the sleeve *surround* the tray, Gics , who also teaches a food tray that can be upstandingly placed, teaches it is preferred to surround the tray with the sleeve so the front panel is more appealing to consumers by only displaying decorative graphics only while the rear panel provides the nutritional information and cooking instructions (Column 1, lines 10-59). Therefore, it would have been obvious to modify the sleeve of Anderson so that the sleeve surrounds the tray since this type of sleeve designs provides a more appealing front panel for a consumer. One would have been substituting one known sleeve design for another for the same purpose: to surround a food tray that is upstandingly placed.

20. Regarding claims 12,15,20 ,23,30 Anderson further teaches the tray has a sidewall free edge perpendicular to the sidewall (see flange 50) as recited in claims 12 , 20 and 30, and the sleeve comprises a proximal edges that extends from the base (i.e. item 40 in Figure 11) and a distal edge that is folded out from the side wall (item 106 in Figure 11) to meet the proximal edge to form the leg as recited in claims 15 and 23.

21. Regarding claims 24 and 31, Anderson teaches the cover is releasably adhered to the food cavity (Column 8, lines 34-Column 9, line 13), but is silent in teaching the cover is a polymeric film. Gics is relied on as evidence of the conventionality of using a

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polymeric film to seal the cavity in combination with the sleeve, as an alternative to sealing the food cavity with the sleeve alone and providing the added feature of being able to view the food the tray ( Column 3, lines 3-10 and Column 3, lines 64 to Column 4, line 2, ). Therefore, it would have been obvious to provide a polymeric film to seal the cavity since Gics teaches sealing with either the sleeve or a film and the film provides viewing of the contents of the tray. One would have been substituting one conventional seal for the same purpose: sealing a tray that is upstandingly placed.

22. Regarding claim 33, Anderson teaches the sleeve has a flat portion (item 38' in Figure 11) that covers a sidewall flat portion (i.e. the sleeve covers non-curved portion of the stand-up sidewall in Figure 12 and 11).

23. Regarding claim 36, Anderson teaches a container for cooking food in the microwave that is made from plastic (Column 3, lines 35-38) Column 8, lines 34-Column 9, line 13) , which implies the polymer tray must be transparent to microwaves otherwise the entire food portion (e.g. a stew) would not cook.

24. Claims 13,14,16,21, 22,37 are rejected under 35 U.S.C. 103(a) as being unpatentable over Anderson (US 5011066) in view of Fritz (US 5423453) and Gics (US 5900263), as applied to claims 10,12,15,18,20,23,24,28,30-33,35 above, further in view of Davis (US 5540381).

25. Regarding claims 13,21, and 37, Anderson teaches a flange perpendicular to the tray sidewall, but is silent in teaching slots in the sleeve for retaining the flange. Davis is relied on as evidence of the conventionality of surrounding a food container with a

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sleeve comprising slots to receive the flange perpendicular to the sidewall to secure the container in the sleeve (Abstract, Column 1, lines 9-26 , Column 1, line 57 to Column 2, line 40, see the flange 42 Figure 1 in light of Figure 2). Therefore it would have been obvious to include slots in the sleeve for retaining the flange since this would secure the tray in the sleeve and one would have been substituting one conventional sleeve design for another for the same purpose: surrounding a food container.

26. Regarding claims 14 and 21, Anderson teaches the cover is releasably adhered around the flange around the food cavity (Column 8, lines 34-Column 9, line 13), but is silent in teaching the cover is a polymeric film. Gics is relied on as evidence of the conventionality of using a polymeric film to seal the cavity in combination with the sleeve, as an alternative to sealing the food cavity with the sleeve alone and providing the added feature of being able to view the food the tray ( Column 3, lines 3-10 and Column 3, lines 64 to Column 4, line 2, ). Therefore, it would have been obvious to provide a polymeric film to seal the cavity since Gics teaches sealing with either the sleeve or a film and the film provides viewing of the contents of the tray. One would have been substituting one conventional seal for the same purpose: sealing a tray that is upstandingly placed.

27. Regarding claim 16, Anderson teaches the sleeve comprises a proximal edge that extends from the base (i.e. item 40 in Figure 11) and a distal edge that is folded out from the sidewall (item 106 in Figure 11) to meet the proximal edge to form the leg.

28. Claims 17 and 27 are rejected under 35 U.S.C. 103(a) as being unpatentable over Anderson (US 5011066) in view of Fritz (US 5423453), Gics (US 5900263), and Davis (US 5540381) as applied to claims 13,14,16,21, 22,37 above, further in view of Jackson (US 6105774).

29. Anderson is silent in teaching surrounding a stack of trays. Jackson is relied on as evidence of the conventionality of surrounding a stack of food containers with a sleeve to provide an easy means for transporting numerous containers with visibility of the containers (Abstract, Column 1, line64 to Column 2, line 10, and Figures).

However, to surround a stack of trays with a sleeve would have been an obvious matter of package design, depending on the intended number of trays transported/sold at one time, since Jackson teaches a sleeve surrounding a stack of trays to provide an easy means for transporting numerous containers with visibility of the containers. One would have been substituting one type of sleeve design for another.

30. Claims 11,19, 24, and 29 are rejected under 35 U.S.C. 103(a) as being unpatentable over Anderson (US 5011066) in view of Fritz (US 5423453) and Gics (US 5900263), as applied to claims 10,12,15,18,20,23,24,28,30-33,35 above, further in view of Bunce et al. (US 4924048)

31. Regarding claims 11,19, and 29, Anderson is silent in teaching handles for the tray that extend inwardly. Bunce et al. are relied on as evidence of the conventionality of providing handles along the flange of a microwave food tray for convenience (Abstract, Column 1, lines 31-45). Fritz is relied on as evidence that the walls should

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extend inwardly for handling and structural reinforcement so the walls/flange will not bend during handling (Column 4, lines 35-62). Therefore, it would have been obvious to include handles on the tray that extend inwardly from the flange since it was known to add handles for convenience and extending walls inwardly allow for greater durability for handling a tray about the flange/handle area. One would have been substituting one conventional microwave tray design for another.

32. Regarding claim 24, Anderson teaches a sidewall free edge perpendicular to the sidewall (see flange 50) and the cover is releasable adhered to the flange around the food cavity (Column 8, lines 34-Column 9, line 13), but is silent in teaching the cover is a polymeric film. Gics is relied on as evidence of the conventionality of using a polymeric film to seal the cavity, as recited in claim 8, in combination with the sleeve, as recited in 9, as an alternative to sealing the food cavity with the sleeve alone and providing the added feature of being able to view the food the tray ( Column 3, lines 3-10 and Column 3, lines 64 to Column 4, line 2, ). Therefore, it would have been obvious to provide a polymeric film to seal the cavity since Gics teaches sealing with either the sleeve or a film and the film provides viewing of the contents of the tray. One would have been substituting one conventional seal for the same purpose: sealing a tray that is upstandingly placed.

33. Claims 25 and 26 are rejected under 35 U.S.C. 103(a) as being unpatentable over Anderson (US 5011066) in view of Fritz (US 5423453) , Gics (US 5900263), and

Bunce et al. (US 4924048) as applied to claims 11,19,24, and 29 above, further in view of Davis (US 5540381).

34. Regarding claim 25, Anderson teaches a flange perpendicular to the tray sidewall, but is silent in teaching slots in the sleeve for retaining the flange. Davis is relied on as evidence of the conventionality of surrounding a food container with a sleeve comprising slots to receive the flange perpendicular to the sidewall to secure the container in the sleeve (Abstract, Column 1, lines 9-26, Column 1, line 57 to Column 2, line 40, see the flange 42 Figure 1 in light of Figure 2). Therefore it would have been obvious to include slots in the sleeve for retaining the flange since this would secure the tray in the sleeve and one would have been substituting one conventional sleeve design for another for the same purpose: surrounding a food container.

35. Regarding claim 26, Anderson teaches the sleeve comprises a proximal edge that extends from the base (i.e. item 40 in Figure 11) and a distal edge that is folded out from the sidewall (item 106 in Figure 11) to meet the proximal edge to form the leg.

36. Claim 34 is rejected under 35 U.S.C. 103(a) as being unpatentable over Anderson (US 5011066) in view of Fritz (US 5423453) and Gics (US 5900263), as applied to claims 10,12,15,18,20,23,24,28,30-33,35 above, further in view of Jackson (US 6105774).

37. Anderson is silent in teaching surrounding a stack of trays. Jackson is relied on as evidence of the conventionality of surrounding a stack of food containers with a sleeve to provide an easy means for transporting numerous containers with visibility of

the containers (Abstract, Column 1, line 64 to Column 2, line 10, and Figures).

However, to surround a stack of trays with a sleeve would have been an obvious matter of package design, depending on the intended number of trays transported/sold at one time, since Jackson teaches a sleeve surrounding a stack of trays to provide an easy means for transporting numerous containers with visibility of the containers. One would have been substituting one type of sleeve design for another.

38. Claims 38, 40, 43, and 46 are rejected under 35 U.S.C. 103(a) as being unpatentable over Anderson (US 5011066) in view of Fritz (US 5423453) and Gics (US 5900263).

39. Regarding claims 38, 40, and 43, Anderson teaches a providing a microwavable tray that is placed in an upstanding position (Column 1, line 25 to Column 2, line 40) with a sidewall free edge perpendicular to the sidewall (see flange 50), as recited in claim 40, and a sleeve that covers the tray cavity holding a food pouch, as recited in claim 35, (Column 4, lines 1-16, Column 8, lines 34-Column 9, line 13 item 82 in Figure 2) wherein the sleeve has a front panel (item 19 in Figure 8, Column 3, lines 56-61), a rear panel adjacent the base (i.e. item 40 in Figure 11) that extends outwardly (away from the base) to form a leg for standing (See Figures 2 and 5), as recited in claim 38, and a proximal edge that extends from the base (i.e. item 40 in Figure 11), a distal edge that is folded out from the sidewall (item 106 in Figure 11) to meet the proximal edge to form the leg, as recited in claim 43. Although Anderson teaches the tray is upstanding and the sleeve includes a front panel, side panel, and rear panel, Anderson

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is silent in teaching a base with a raised button and the sleeve *surrounds* the tray as recited in claim 38.

40. Fritz teaches it is notoriously well known in the art to include a raised button on the base of a microwavable tray to distribute the contents in the tray and distribute the heat throughout the tray during cooking (Column 1, lines 50-60, Column 2, lines 10-15, Column 2, lines 30-35, Column 3, lines 10-30). Therefore, it would have been obvious to modify the tray of Anderson and include a raised button on the base since a raised button will better distribute the contents in the tray and distribute the heat during cooking than a flat base.

41. With respect to having the sleeve *surround* the tray, Gics , who also teaches a food tray that can be upstandingly placed, teaches it is preferred to surround the tray with the sleeve so the front panel is more appealing to consumers by only displaying decorative graphics only while the rear panel provides the nutritional information and cooking instructions (Column 1, lines 10-59). Therefore, it would have been obvious to modify the sleeve of Anderson so that the sleeve surrounds the tray since this type of sleeve designs provides a more appealing front panel for a consumer. One would have been substituting one known sleeve design for another for the same purpose: to surround a food tray that is upstandingly placed.

42. Regarding claim 46, Anderson teaches removing the sleeve, pouring food into the tray, placing the sleeve and placing the microwave to retard sputtering (Column 8, lines 34-Column 9, line 13) .

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43. Claim 39 is rejected under 35 U.S.C. 103(a) as being unpatentable over Anderson (US 5011066) in view of Fritz (US 5423453) and Gics (US 5900263), as applied to claims 38,40,43,46 above, further in view of Bunce et al. (US 4924048)

44. Anderson is silent in teaching handles for the tray that extend inwardly. Bunce et al. are relied on as evidence of the conventionality of providing handles along the flange of a microwave food tray for convenience (Abstract, Column 1, lines 31-45). Fritz is relied on as evidence that the walls should extend inwardly for handling and structural reinforcement so the walls/flange will not bend during handling (Column 4, lines 35-62). Therefore, it would have been obvious to include handles on the tray that extend inwardly from the flange since it was known to add handles for convenience and extending walls inwardly allow for greater durability for handling a tray about the flange/handle area. One would have been substituting one conventional microwave tray design for another.

45. Claims 41 and 42 are rejected under 35 U.S.C. 103(a) as being unpatentable over Anderson (US 5011066) in view of Fritz (US 5423453) and Gics (US 5900263), as applied to claims 38,40, 43,46 above, further in view of Davis (US 5540381).

46. Regarding claim 41, Anderson teaches a flange perpendicular to the tray sidewall, but is silent in teaching slots in the sleeve for retaining the flange. Davis is relied on as evidence of the conventionality of surrounding a food container with a sleeve comprising slots to receive the flange perpendicular to the sidewall to secure the container in the sleeve (Abstract, Column 1, lines 9-26, Column 1, line 57 to Column 2,

line 40, see the flange 42 Figure 1 in light of Figure 2). Therefore it would have been obvious to include slots in the sleeve for retaining the flange since this would secure the tray in the sleeve and one would have been substituting one conventional sleeve design for another for the same purpose: surrounding a food container.

47. Regarding claim 42, Anderson teaches the cover is releasable adhered around the flange around the food cavity (Column 8, lines 34-Column 9, line 13), but is silent in teaching the cover is a polymeric film. Gics is relied on as evidence of the conventionality of using a polymeric film to seal the cavity in combination with the sleeve, as an alternative to sealing the food cavity with the sleeve alone and providing the added feature of being able to view the food the tray ( Column 3, lines 3-10 and Column 3, lines 64 to Column 4, line 2, ). Therefore, it would have been obvious to provide a polymeric film to seal the cavity since Gics teaches sealing with either the sleeve or a film and the film provides viewing of the contents of the tray. One would have been substituting one conventional seal for the same purpose: sealing a tray that is upstandingly placed.

48. Claim 45 is rejected under 35 U.S.C. 103(a) as being unpatentable over Anderson (US 5011066) in view of Fritz (US 5423453) and Gics (US 5900263), as applied to claims 38,40,43,46 above, further in view of Jackson (US 6105774).

49. Anderson is silent in teaching surrounding a stack of trays. Jackson is relied on as evidence of the conventionality of surrounding a stack of food containers with a sleeve to provide an easy means for transporting numerous containers with visibility of

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the containers (Abstract, Column 1, line 64 to Column 2, line 10, and Figures).

However, to surround a stack of trays with a sleeve would have been an obvious matter of package design, depending on the intended number of trays transported/sold at one time, since Jackson teaches a sleeve surrounding a stack of trays to provide an easy means for transporting numerous containers with visibility of the containers. One would have been substituting one type of sleeve design for another.

### ***Double Patenting***

50. The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and, *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

51. Claims 1-6,8,9, are rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-7 of U.S. Patent No.

6,621,616 B1. Although the conflicting claims are not identical, they are not patentably distinct from each other because the limitations recited in claim 1 and 3 are claimed in claim 1 of '616. The claims only differ in that the present application does not include the limitation of a pair of ears at the free edge of the tray, as claimed in claim 1 of '616.

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Furthermore, the dependent claims 2,4-6,8,9 of the present application recite the same limitations claimed in claims 2,3,4,5,6,7, respectively, of '616.

52. Claims 1-3,5-9 are rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 26,33 of U.S. Patent No. 6,621,616 B1. Although the conflicting claims are not identical, they are not patentably distinct from each other because the limitations recited in claim 1 - 3 are claimed in claim 26 of '616. The claims only differ in that the present application does not include the limitation of a pair of ears at the free edge of the tray, as claimed in claim 1 of '616. Furthermore, the limitations recited in claims 5,6,8, and 9 of the present application are claimed in claims 33,28 and 29 of '616.

53. Claim 7 is rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claim of 1-7 and 26-34 U.S. Patent No. 6,621,616 B1 in view of Davis (US 5540381).

54. '616 claims a flange at a free edge(in claim 28) and '616 claims ears at free edge that terminates with pair of ears that is inserted into slots in the sleeve (claims 1 and 26), but does not claim the flange that is inserted into the slots in the sleeve. However, Davis is relied on as evidence of the conventionality of surrounding a food container with a sleeve comprising slots to receive the flange perpendicular to the sidewall to secure the container in the sleeve (Abstract, Column 1, lines 9-26 , Column 1, line57 to Column 2, line 40, see the flange 42 Figure 1 in light of Figure 2). Therefore

it would have been obvious to include slots in the sleeve for retaining the flange since this would secure the tray in the sleeve and one would have been substituting one conventional sleeve design for another for the same purpose: surrounding a food container.

55. Claims 10-12, 15 are rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 8-12, and 16 of U.S. Patent No. 6,621,616 B1. Although the conflicting claims are not identical, they are not patentably distinct from each other because the limitations recited in claims 10-12, 15 of the present application are claimed in claims 8-10, and 16, respectively of '616. The claims only differ in that the present application does not include the limitation of a pair of ears at the free edge of the tray, as claimed in claim 8 of '616.

56. Claims 13, 14, 16, and 17 are rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 8-12, and 16 of U.S. Patent No. 6,621,616 B1 in view of Davis (US 5540381).

57. Regarding claim 13, '616 claims a flange at a free edge (in claim 10) and '616 claims ears at free edge that terminates with pair of ears that is inserted into slots in the sleeve (claim 8), but does not claim the flange is inserted into the slots in the sleeve. However, Davis is relied on as evidence of the conventionality of surrounding a food container with a sleeve comprising slots to receive the flange perpendicular to the sidewall to secure the container in the sleeve (Abstract, Column 1, lines 9-26, Column

1, line 57 to Column 2, line 40, see the flange 42 Figure 1 in light of Figure 2). Therefore it would have been obvious to include slots in the sleeve for retaining the flange since this would secure the tray in the sleeve and one would have been substituting one conventional sleeve design for another for the same purpose: surrounding a food container.

58. Regarding claims 14, 16, and 17, the limitations are claimed in '616 claims 11, 12, and 16, respectively.

59. Claims 18-20, 23, 24, rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 17, 18, 20, 22, 23, of U.S. Patent No. 6,621,616 B1. Although the conflicting claims are not identical, they are not patentably distinct from each other because the limitations recited in claims 18-20, 23, 24, of the present application are claimed in claims 17, 18, 20, 22, 23, respectively, of '616. The claims only differ in that the present application does not include the limitation of a pair of ears at the free edge of the tray, as claimed in '616, claim 17.

60. Claims 21, 22, 27, 25, and 26 are rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 17, 18, 20, 21, 22, 23, 24, 25 of U.S. Patent No. 6,621,616 B1 in view of Davis (US 5540381).

61. Regarding claims 21 and 25, '616 claims a flange at a free edge (in claim 20) and '616 claims ears at free edge that terminates with pair of ears that is inserted into slots in the sleeve (claim 17), but does not claim the flange is inserted into the slots in the

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sleeve. However, Davis is relied on as evidence of the conventionality of surrounding a food container with a sleeve comprising slots to receive the flange perpendicular to the sidewall to secure the container in the sleeve (Abstract, Column 1, lines 9-26, Column 1, line 57 to Column 2, line 40, see the flange 42 Figure 1 in light of Figure 2). Therefore it would have been obvious to include slots in the sleeve for retaining the flange since this would secure the tray in the sleeve and one would have been substituting one conventional sleeve design for another for the same purpose: surrounding a food container.

62. Regarding claims 22, 26, and 27, these limitations are claimed in '616 claims 21, 24, and 25, respectively.

63. Claims 28-36 are rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 26-34 of U.S. Patent No. 6,621,616 B1. Although the conflicting claims are not identical, they are not patentably distinct from each other because the limitations recited in claims 28-36 of the present application are claimed in claims 26-34, respectively of '616. The claims only differ in that the present application does not include the limitation of a pair of ears at the free edge of the tray, as claimed in claim 28 of '616.

64. Claim 37 is rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 26-34 of U.S. Patent No. 6,621,616 B1 in view of Davis (US 5540381).

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65. Regarding claims 37, '616 claims a flange at a free edge (in claim 28) and '616 claims ears at free edge that terminates with pair of ears that is inserted into slots in the sleeve (claim 26), but does not claim the flange is inserted into the slots in the sleeve. However, Davis is relied on as evidence of the conventionality of surrounding a food container with a sleeve comprising slots to receive the flange perpendicular to the sidewall to secure the container in the sleeve (Abstract, Column 1, lines 9-26, Column 1, line 57 to Column 2, line 40, see the flange 42 Figure 1 in light of Figure 2). Therefore it would have been obvious to include slots in the sleeve for retaining the flange since this would secure the tray in the sleeve and one would have been substituting one conventional sleeve design for another for the same purpose: surrounding a food container.

66. Claims 38-40, 43-46 are rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 35-37, 39, 42 and 43 of U.S. Patent No. 6,621,616 B1. Although the conflicting claims are not identical, they are not patentably distinct from each other because the limitations recited in claims 38-40, 43/44, 45, 46 of the present application are claimed in claims 35-37, 39, 42, 43, respectively of '616. The claims only differ in that the present application does not include the limitation of a pair of ears at the free edge of the tray, as claimed in claim 28 of '616.

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67. Claims 41 and 42 are rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 37 and 38 of U.S. Patent No. 6,621,616 B1 in view of Davis (US 5540381).

68. '616 claims a film removable secured to the flange (in claim 37), as recited in claim 42, and '616 claims ears at free edge that terminates with pair of ears that is inserted into slots in the sleeve (claim 35), but does not claim the flange is inserted into the slots in the sleeve, as recited in claim 41 of the present application. However, Davis is relied on as evidence of the conventionality of surrounding a food container with a sleeve comprising slots to receive the flange perpendicular to the sidewall to secure the container in the sleeve (Abstract, Column 1, lines 9-26, Column 1, line 57 to Column 2, line 40, see the flange 42 Figure 1 in light of Figure 2). Therefore it would have been obvious to include slots in the sleeve for retaining the flange since this would secure the tray in the sleeve and one would have been substituting one conventional sleeve design for another for the same purpose: surrounding a food container.

### ***Conclusion***

69. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure. Gics (US 5900264) and Gics (US 595484) teach upstanding trays in sleeves. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Robert Madsen whose telephone number is (703)305-0068. The examiner can normally be reached on 7:00AM-3:30PM M-F.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on (703)308-3959. The fax phone numbers for the organization where this application or proceeding is assigned are (703)872-9310 for regular communications and (703)872-9311 for After Final communications.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is (703) 308-0061.

Robert Madsen  
Examiner  
Art Unit 1761  
March 6, 2003

  
**STEVE WEINSTEIN**  
**PRIMARY EXAMINER** 1761